IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 580 OF 2004

SHAIKH JAVED SHAIKH LAL)
residing at BIT Chawl No.2/)
60, Ibrahim Rahimtulla)
Road, 2nd floor,)
Mumbai - 400 003) .. PETITIONER

vs

1. THE STATE OF MAHARASHTRA)
Through the Secretary to)
the Govt. of Maharashtra)
Home Dept., Mantralaya)
MUMBAI 400 032)

2. NEELA SATYANARAYAN)
The Principal Secretary)
(Appeals & Security) to)
the Govt. of Maharashtra)
Home Department and)
Detaining Authority,)
Mantralaya, Mumbai – 32)

3. THE SUPERINTENDENT OF)
PRISON, The Mumbai)
Central Prison, Arthur)
Road, Mumbai.)

4. THE SUPERINTENDENT OF)
PRISON, Nasik Road)
Central Prison, Nasik)

5. THE UNION OF INDIA).. RESPONDENTS

Mr. Maqsood Khan for petitioner
Mr. B. R. Patil, Actg. PP.

CORAM:-SMT. RANJANA DESAI &
A. S. OKA, JJ.
DATED:-2-11-2004

ORAL JUDGMENT:-(Smt. Ranjana Desai, J.)

The petitioner is the brother of one Shaikh Dilnawaz Shaikh Lal ("the detenu" for convenience). By an order of detention dated 5-3-04 issued by the Principal Secretary (Appeals and Security) to the Govt. of Maharashtra, Home Department the detenu has been detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("the COFEPOSA" for short) with a view to preventing him in future from smuggling goods. In this petition there is a challenge to the said order of detention.

2. The order of detention, grounds of detention and the material in support thereof were served on the detenu on 5.3.04 and he was detained on the same day.

3. Mr. Khan learned counsel appearing for the petitioner challenged the detention order only on two grounds. He firstly contended that the order of detention is not made by the detaining authority. She has merely signed the order. The grounds have not been formulated by her contemporaneously when she issued order of detention and on that count the order of detention should be set aside. In support of this submission, Mr. Khan relied upon Division Bench decisions of this court in Mohamed Abubukar Marwari v. Union of India & Ors., 1982 Cri.L.J. 53 & Ashwinkumar B. Halari v. State of Maharashtra & Ors., 1987 Cri. L.J. 1798

4. Mr. Khan drew our attention to paragraphs 3 and 4 of the petition where according to him this point is raised. So far as ground 3 is concerned a bare reading of the same shows that there the challenge is as regards the delay in issuing the order of detention. So far as ground 4 is concerned, the petitioner has called upon the detaining authority to disclose to

the court when the detaining authority had formulated the grounds of detention. The detaining authority has further been called upon to disclose whether she had received any further documents thereafter and if so, when and which documents she had received at a later date after she had drafted the grounds of detention. The detaining authority has been further called upon to say that, if any further grounds of detention were received by her then it was enjoined upon her to disclose whether she has rescinded the grounds already drafted by her and as to whether she had reconsidered afresh the documents earlier received along with the proposal and the documents received at a later date together, all at a time, and whether she had formulated the grounds of detention all over again before issuing the order of detention. The detaining authority is further called upon to state whether she had received any additional documents after she had drafted the grounds on the basis of the documents earlier received along with the proposal and if she had received any such additional documents whether she had rescinded the grounds already formulated and had reconsidered the matter afresh and had reformulated the grounds.

5. In reply to this, the detaining authority has stated as under:

"I say that the documents received were scrutinized by the Assistant on 13.1.2004 and forwarded it to the Desk Officer. The Desk Officer carefully went through the documents and on 14.1.2004 forwarded it to the Deputy Secretary. The Deputy Secretary carefully went through all the documents and on 15.1.2004 forwarded it to me. I say that as the Detaining Authority I carefully went through all the papers and gave my endorsement on 15.1.2004. It is stated that since the documents pertaining to adjudication order, show cause notice, reply to show cause notice and legible copies of

certain documents and the photo copy of the detenu along with further generated documents by letter dated 17.1.2004 was called upon from the Sponsoring Authority. On 21.1.2004 the Sponsoring Authority forwarded the documents. On 24.1.2004, 25.1.2004 and 26.1.2004 there were holidays. On 27.1.2004 the Assistant forwarded the papers to the Desk Officer. The Desk Officer after going through the papers forwarded on the same day to the Deputy Secretary. On 28.1.2004 the Deputy Secretary forwarded it to me i.e. Detaining Authority. On 28.1.2004 I went through the documents and gave my endorsement. On 7.2.2004 the documents pertaining to the earlier trips of the detenu were forwarded by the Sponsoring Authority. The said documents were forwarded by the Assistant to the Desk Officer on 7.2.2004. The Desk Officer went through the same and forwarded it to the Deputy Secretary on 9.2.2004. It is stated that 8.2.2004 was holiday. The Deputy Secretary went through the documents on 9.2.2004 and forwarded it to me on the same day. I say that on the same day i.e. on 9.2.2004 I carefully went through the papers and gave my endorsement on the same day. It is stated that 14.2.2004, 15.2.2004, 18.2.2004, 19.2.2004 and 22.2.2004 were holidays. On 24.2.2004 the draft grounds of detention were formulated which were forwarded by the Assistant to the Desk Officer. The Desk Officer forwarded it to the Deputy Secretary and the Deputy Secretary by his endorsement dated 26.2.2004 forwarded it to me. I say that on 1.3.2004 I approved the draft grounds of detention and thereafter the papers were forwarded to the Cofeposa Cell for preparing 7 sets of fair copies etc. I say that on receiving the papers I contemporaneously issued the order of detention on 5.3.2004."

6. It is clear from the above paragraph of the affidavit of the detaining authority that the papers which were forwarded to her by the sponsoring authority were considered by her.

From the affidavit it is clear that on every occasion when the papers were forwarded to her she went through them and gave her endorsement on them. She has stated that on 24th February, 1984, draft grounds of detention were formulated and they were forwarded to her by the Assistant to the Desk Officer. The Desk Officer forwarded them to the Deputy Secretary and the Deputy Secretary by his endorsement dated 26.2.2004 forwarded them to her and on 1.3.2004 she had approved the draft Grounds of Detention and thereafter the papers were forwarded to the Cofeposa Cell for preparing seven sets of fair copies etc. On receiving the papers she contemporaneously issued the order of detention on 5.3.2004. There is no reason for us to disbelieve the statement made by the detaining authority that she had carefully considered all the documents placed before her and that she had approved the draft grounds of detention and issued the order of detention. The question of rescinding the grounds of detention would have arisen only if she had disagreed with the draft grounds of detention or if she wanted to make any changes therein. That does not appear to be the case here. Moreover though it was contended before us that the grounds of detention are not formulated by the detaining authority, there is no specific challenge about this in the petition. The detaining authority was not called upon to specifically answer this challenge. It would be therefore, wrong for us to presume that she has not applied her mind and that she had not issued the order of detention personally. Her affidavit does not give such impression.

7. It is true that in Marwari's case (supra) this court has held that formulation, framing and signing of the grounds by the detaining authority at about the time of making of the order of detention is an important assurance and a safeguard inter alia on the question that there was material; that the said material was scanned and sifted; that the irrelevant, if

any, was rejected and the relevant only relied upon; that thereafter conclusions were drawn and grounds formulated therefrom; and there was thus, at the relevant time, a case for detention made out, although under the subjective and bonafide satisfaction of the detaining authority.

8. From the affidavit of the detaining authority in this case we feel that her application of mind cannot be doubted. She has categorically stated that she had approved the draft grounds of detention. There appears to be signing of the grounds of detention at about the time of making of order of detention. In the absence of a specific challenge we are unable to find fault with the detaining authority on the ground that she has left the important task of issuing the order of detention to someone else.

9. In Ashwinkumar's case (supra) this court was critical of the approach of the detaining authority who had issued the detention order. In the facts of that case, this court came to a conclusion that the conclusions were predrawn and the documents which were received subsequently were only referred to, to confirm or endorse the said conclusions. In the facts of this case, we are unable to come to such a conclusion. Though there is no specific challenge the detaining authority has in her affidavit clearly stated that she had carefully gone through all the documents and approved the draft grounds. The judgment in Ashwinkumar's case will have to be confined to its peculiar facts. We therefore, reject this submission of Mr. Khan.

10. The second submission of Mr. Khan is that the detenu had addressed a representation to the Advisory Board. His request was that the Advisory Board should

consider it. However, the said representation was considered by the detaining authority as well as the State Government and that has prejudiced his right under Article 22(5) of the Constitution of India. Mr. Khan contended that at the time when the detenu made representation to the Advisory Board, there was no occasion for him to make a representation to the State Government and to the detaining authority. It is for the detenu to decide at what point of time he should make the representation and to which authority he should make it and the detenu cannot be deprived of this right.

11. The fact that his representation was considered by the State Government and by the detaining authority is apparent from the affidavit in reply filed by the detaining authority. In paragraph 9 of the said affidavit the detaining authority has stated that the said representation was considered by her without being influenced by the opinion of the Advisory Board on 27.4.04 and reject reply was sent to the detenu. It is also stated that the said representation was considered by the Additional Chief Secretary (Home) without being influenced by the report of the Advisory Board and reject reply was given to the detenu on 10-5-04. Mr. Khan drew our attention to a judgment of the Supreme Court in Union of India & Anr. v. Sneha Khemka & Anr., 2004 SCC (Cri.) 579 and contended that it was not open for the State Government and the detaining authority to consider the representation addressed by the detenu to the Advisory Board. Mr. Khan urged that on this count the continued detention of the detenu is liable to be set aside.

12. In our opinion, the judgment in Sneha Khemka's case (supra) does not help the petitioner. It is true that there the Supreme Court has held that the decisions of the Supreme Court on which reliance had been placed by the High Court, nowhere stated

that copy of the representations made by the detenu to one authority must be placed before all the authorities and all such authorities also should consider and pass orders on those representations, though really not made to any one of them. However, the Supreme Court has not stated that if the other authorities consider the representation, the continued detention of the detenu is liable to be set aside because that is illegal. The Supreme Court has not stated that there is any embargo or fetters on the other authorities which would prevent them from considering the said representation. In our opinion, therefore, the judgment of the Supreme Court in Sneha Khemka's case (supra) is of no use to the petitioner. Besides we find that this point is not raised at all in the petition. Therefore, there was no occasion for the authorities to meet it. In such circumstances we are unable to set aside the order of detention on this ground.

13. Since both the points raised by Mr. Khan are rejected by us, the petition will have to be dismissed and is dismissed as such.

(SMT. RANJANA DESAI, J.)

(A. S. OKA, J.)